Supreme Court, U. S.
FILED
FEB 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1100

GEORGE E. SANGMEISTER, et al.,
Plaintiffs-Appellees,

vs.

CLARA HARTLEY WOODARD, County Clerk of Will County, Illinois,
Defendant,

THE STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS,
Intervening Defendant-Appellant.

—— Consolidated With ——

WILLIAM WALSH,
Plaintiff-Appellee,

vs.

THE BOARD OF ELECTION COMMISSIONERS OF CHICAGO, et al.,
Defendants,

ILLINOIS ASSOCIATION OF COUNTY CLERKS AND RECORDERS,
Intervening Defendant.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

MICHAEL E. LAVELLE
100 N. LaSalle Street
Chicago, Illinois 60602

MICHAEL L. LEVINSON
100 N. LaSalle Street
Chicago, Illinois 60602

FRANKLIN J. LUNDING, JR.
100 N. LaSalle Street
Chicago, Illinois 60602

JOHN H. BICKLEY, JR.
77 W. Washington Street
Chicago, Illinois 60602

Attorneys for Appellant
Illinois State Board of Elections

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	4
I. Did The Court Of Appeals Correctly Conclude That The Equal Protection Clause Of The Fourteenth Amendment Is Violated By Not Allowing The Candidates Of A Particular Political Party The Opportunity To Be Placed In The Top Ballot Position In A General Election Ballot?	4
II. Have Appellees Proven That Top Ballot Position By Political Party Placement In A General Election Is An Advantage In An Election?	4
STATEMENT OF THE CASE	4
THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

Culliton v. Board of Election Commissioners of DuPage County, ... F.2d ..... (1977)	5
New York State Democratic Party v. Lomenzo, 400 F.2d 240 (1972)	8
Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260 (1970)	8
Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274 (1974)	8

Constitutional Provision

The Equal Protection Of The Laws Clause Of The Fourteenth Amendment To The United States Constitution 3

State Statutes

Chap. 46 Illinois Revised Statutes, (Election Code):
§ 1A-8 5
§ 16-3 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

GEORGE E. SANGMEISTER, et al.,
Plaintiffs-Appellees,

vs.

CLARA HARTLEY WOODARD, County Clerk of Will County, Illinois,
Defendant,

THE STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS,
Intervening Defendant-Appellant.

—— Consolidated With ——

WILLIAM WALSH,
Plaintiff-Appellee,

vs.

THE BOARD OF ELECTION COMMISSIONERS OF CHICAGO, et al.,
Defendants,

ILLINOIS ASSOCIATION OF COUNTY CLERKS AND RECORDERS,
Intervening Defendant.

On Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, State Board of Elections, files this statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order entered by the Court of Appeals for the 7th Circuit in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the 7th Circuit was decided November 7, 1977 (App. A, page 1a).

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division with the Honorable Thomas R. McMillen, Judge presiding, was orally rendered Feb. 17, 1977 (App. D, page 18a).

JURISDICTION

This appeal arises from two separate actions filed by appellees in the United States District Court for the Northern District of Illinois, challenging as unconstitutional, actions by two county clerks and a board of election commissioners in Illinois, in not allowing candidates of a particular political party to be placed in the initial position on the general election ballot.

In both cases, appellees claimed a deprivation under color of state law and a violation of their privileges and immunities secured by the United States Constitution providing for equal rights of citizens. Both were actions in equity in which the appellees sought relief under 24 U.S.C. 1983, 28 U.S.C., §§ 2201-2202, and under the Fourteenth Amendment of the United States Constitution.

On November 7, 1977, the United States Court of Appeals for the Seventh Circuit affirmed that portion of the District Court's order, finding that the denial of top ballot position on a general election ballot to candidates of a political party constituted a violation of the *Equal Protection of the Laws Clause* under the Fourteenth Amendment of the United States Constitution.

A timely notice of appeal was filed on January 31, 1978, with the Clerk of the United States Court of Appeals for the Seventh Circuit.

The jurisdiction of this appeal is conferred on this Court, pursuant to 28 U.S.C. 1254(2).

In the event that this Court does not consider appeal the proper mode of review, the appellant respectfully requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari, pursuant to 28 U.S.C., § 2103.

STATUTE INVOLVED

"The list of candidates of the several parties [political] and any such list of independent candidates shall be placed in separate columns on the ballot in such order as the authorities charged with the printing of the ballot shall decide; . . . ." 46 Ill. Rev. Stats., § 16-3.

QUESTIONS PRESENTED

(1) Did the Court of Appeals correctly conclude that the Equal Protection Clause of the Fourteenth Amendment is violated by not allowing the candidates of a particular political party the opportunity to be placed in the top ballot position in a general election ballot?

(2) Have appellees proven that top ballot position by political party placement in a general election is an advantage in an election?

STATEMENT OF THE CASE

Appellees commenced two separate actions in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief against the actions of the two County Clerks and the Chicago Board of Election Commissioners in placing candidates of the County Clerk's political party in top ballot position.

In *Sangmeister, et al. v. Woodard*, No. 76 C 3635, Democratic candidates for office in the November, 1976, general election in Will County sought declaratory and injunctive relief from the alleged practice of the County Clerk of placing the Republican Party candidates at the top of the ballot.

In *Walsh, et al. v. Board of Election Commissioners of Chicago, et al.*, No. 76 C 3752, Republican candidates sought relief against a Democratic County Clerk and the Chicago Board of Election Commissioners from placing candidates of the Democratic Party in top ballot position.

The appellant, State Board of Elections, was joined as a defendant in *Sangmeister* after filing a Motion to Intervene, based on our responsibility for supervising the administration of election laws in the State pursuant to Chapter 46, Ill. Rev. Stats., § 1A-8.

After a consolidated trial in *Sangmeister* and *Walsh*, on February 17, 1977, the District Court held that "the position on the ballot for that candidate would be a preferred position on a general election even though they might appear under party name." (App. D, p. 20a.) The District Court also found that the record ". . . shows a discrimination against candidates who are deprived of top position on the ballot." (App. D, p. 20a.)[1]

On November 6, 1977, the Court of Appeals held that the practice of the County Clerks in excluding appellees from top ballot position was intentional and worked a substantial disadvantage to them in violation of the Fourteenth Amendment of the United States Constitution.[2]

---

[1] As a constitutional remedy, the Court ordered rotation of the major parties' position on the general election ballot by precinct, even precincts with one major party at the top and the odd precincts with another party at the top. However, the Court of Appeals reversed the District Court's order that a rotational selection system be judicially mandated and remanded the case to the District Court to order the County Clerks and Chicago Board of Election Commissioners to "devise a constitutionally permissible ballot placement procedure." (App. A, p. 14a.)

[2] The case of *Culliton v. Board of Election Commissioners of the County of DuPage, et al.*, was consolidated for appeal. The Court of Appeals affirmed the preliminary injunction against defendants and remanded the case to the District Court for full hearing on the merits to be held in accordance with the views expressed in their opinion. (App. A, p. 15a.) The appellant was not a party in *Culliton*.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The ruling of the Court of Appeals makes a substantial far-reaching change in the electoral processes of the State of Illinois. It involves the right of election authorities of the State of Illinois to administer their elections in accordance with Illinois law and practice.

By finding that the top ballot position has an effect on voting in the general election and thereby negating 100 years of Illinois election practices, the Court of Appeals required in effect, Illinois election officials to conduct lotteries for placement of political parties or rotation of political parties on the ballot, or both—all of which infringe on the voter's right to a simple, standardized ballot.

Top political party placement on the ballot is not tantamount to top ballot position for an individual candidate in a general election since numerous other factors are involved; for example,

- location of the office on the ballot
- relative location of local, state and federal candidates on the ballot;
- relative location of independent candidates on the ballot;
- number of candidates on the ballot for each office;
- configuration of the ballot (are the columns listed horizontally or vertically?) and
- the type of ballot or mode of voting (paper, machine or punch card).

In order to find a violation of the Equal Protection of the Laws clause, the Court of Appeals reasoned that the appellees "must 'show that top placement on the ballot is an advantage in an election.'" (App. A, p. 8a.)

Appellant maintains that not one scintilla of evidence was introduced to support ballot position effect in the *State of Illinois* regarding *general elections.*

Appellees totally failed in their burden to show that top placement on the ballot is an advantage in a general election. The evidence adduced from their expert witness, Samuel Kirkpatrick, Ph.D., consisted of laboratory experiments of simulated elections, field studies of simulated elections and *ex post facto* field studies of actual elections—none involving general elections in Illinois. In fact, Kirkpatrick testified that he was unable to draw any conclusions about ballot position effect in the recently conducted 1976 general election in DuPage County Illinois, wherein the United States Labor Party (after gaining top ballot position by lottery pursuant to the District Judge's Order in *Culliton, supra*), received only one-tenth of one percent of the total votes cast in the entire county.

This Court should consider the substantial question of whether a violation of the Fourteenth Amendment in election-related matters can be predicated upon fictitious out-of-state studies.

The proposition that appellees' case is built from gossamer cloth of sheer speculation, is clearly evidenced by the following excerpt from the Court of Appeal's opinion:

> "The plaintiffs'[1] expert, Dr. Samuel A. Kirkpatrick[2], testified based upon previous empirical studies done by other scholars.[3] In his own research, based on the Will County, May, 1976 primary election that, on the average, first place garners 3.3%

> more votes than second place. Dr. Kirkpatrick did recognize that there is a difference in ballot position, for example, between primary and general elections, and that he would expect it to be somewhat reduced, perhaps by a percentage point, sometimes, maybe, as much as 2 percentage points. . . ." (App. A, p. 4a.)

Should a Fourteenth Amendment violation be predicated upon the guessing games of one expert, especially when the decision based on such an opinion will have far-reaching effects across the nation?

Most important, the Court of Appeals completely ignored the significance of the testimony of appellant's expert. Dr. Richard Smolka testified, ". . . that as a social scientist, that there was insufficient evidence upon which to draw a conclusion." (App. A, p. 10a.)

Hence, this case has far-reaching significance on the question of the sufficiency of the evidence to invalidate state administrative action.

As recently as *Storer v. Brown*, 414 U.S. 724, 94 S.Ct. 1274 (1974), this Court affirmed the fundamental principle that it is within state power to prescribe "the times, places and manner" of holding elections. The federal courts should not substitute their judgment for that of the Illinois General Assembly, especially when the evidence upon which appellees' case is based, amounts to nothing more than sheer speculation.

In the absence of valid evidence showing any advantage or disadvantage to a political party in first position placement on the ballot, Illinois should be allowed to conduct its elections in accordance with the procedures set forth by the Illinois General Assembly. (*Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970); *New York State Democratic Party v. Lorenzo*, 400 F.2d 250 (1972)).

The courts must be vigilant in not mandating a cure which when pragmatically administered is worse than the illness, particularly in the absence of any probative or valid evidence supporting appellees' contention that first ballot position for political parties is advantageous to that political party. Moreover, to select one factor in the election process, such as first position on the ballot for political parties, and find that denial is of such constitutional significance; that one's rights under the Constitution are violated, without considering the effect of such a finding upon the variables inherent in the election process, runs the risk of creating more mischief than that which it intended to correct.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this case and give plenary consideration with briefs on the merits and oral arguments for the resolution of this important state question, which has not been, but should be settled by this Court because of the national impact of such question upon elections conducted throughout the United States.

Respectfully submitted,

MICHAEL E. LAVELLE
100 N. LaSalle Street
Chicago, Illinois 60602

MICHAEL L. LEVINSON
100 N. LaSalle Street
Chicago, Illinois 60602

FRANKLIN J. LUNDING, JR.
100 N. LaSalle Street
Chicago, Illinois 60602

JOHN H. BICKLEY, JR.
77 W. Washington Street
Chicago, Illinois 60602

Attorneys for Appellant
Illinois State Board of Elections

APPENDICES

INDEX TO APPENDICES

PAGE

A—Opinion of U.S. Court of Appeals For The Seventh Circuit (Decided Nov. 7, 1977) 1a

B—Judgment Order in Sangmeister vs. Woodard No. 76 C 3635 Dated (Feb. 17, 1977) 16a

C—Judgment Order in Walsh vs. The Board of Election Commissioners, etc., et al No. 76 C 3752 Dated (Feb. 17, 1977) 17a

D—Oral Decision And Excerpt Of Proceedings Before The Honorable Thomas R. McMillen Dated (Feb. 17, 1977) 18a

E—Chapter 46, Illinois Revised Statutes (1975), Sec. 1A-8 ..... 28a

F—Chapter 45, Illinois Revised Statutes (1975), Sec. 16-3 ..... 30a

G—Notice of Appeal To The Supreme Court of the United States 33a

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 77-1365 and 77-1366 (Consolidated)
GEORGE E. SANGMEISTER, et al.,

Plaintiffs-Appellees,

v.

CLARA HARTLEY WOODARD, County Clerk of Will County, Illinois,

Defendant-Appellant.

THE STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS,

Intervening Defendant-Appellant.

WILLIAM WALSH,

Plaintiff-Appellee,

v.

THE BOARD OF ELECTION COMMISSIONERS OF CHICAGO, et al.,

Defendants-Appellants,

ILLINOIS ASSOCIATION OF COUNTY CLERKS AND RECORDERS,

Intervening Defendant-Appellant.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 76 C 3635 and 76 C 3752—**Thomas R. McMillen**, *Judge.*

No. 76-1953
STEPHEN J. CULLITON,

Plaintiff-Appellee,

v.

THE BOARD OF ELECTION COMMISSIONERS OF THE COUNTY OF DU PAGE, and RAYMOND MACDONALD, WILLIAM TOERPE, JR., and JEAN MCNAMARA, Individually and as Commissioners of the Board of Election Commissioners of the County of Du Page,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76 C 3267—**Bernard M. Decker**, *Judge.*

ARGUED SEPTEMBER 15, 1977—DECIDED NOVEMBER 7, 1977

Before SPRECHER, TONE and BAUER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal challenges the decisions of two district courts holding that the practice by Illinois County Clerks of placing their own political party in the first or top position on voting ballots in all general elections violates the equal protection clause.

I

This appeal actually involves three different suits brought against three different County Clerks or County Boards of Election Commissioners in Illinois. Initially, there is the consolidated appeal of two district court cases, *Sangmeister v. Woodard* (Will County) and *Culliton v. DuPage County Board of Election Commissioners* (DuPage County), reported at 419 F. Supp. 126 (N.D. Ill. 1976). However, the *Sangmeister* case was itself a consolidated trial of two actions; the other suit was *Walsh v. Board of Election Commissioners* (Cook County).

A

Although the cases were consolidated for this appeal, the *Culliton* case is in a somewhat different procedural posture before this court and so it will be discussed separately. *Culliton* was filed and tried prior to the November 1976 general election. Plaintiff was a Democratic Party candidate for State's Attorney of DuPage County, Illinois. Defendant is a body of three Commissioners, the County Clerk as Chairman and two others selected by the Circuit Court of DuPage County—one person representing each major party—in accordance with ILL. REV. STAT., 1975, ch. 46, § 6-21. Thus, the majority of that Board represents the Republican Party.

The plaintiff's complaint alleged that the defendant Board "has always placed the Republican Party candidates on the first line of the ballot, and the Democratic Party candidates and the Independent candidates have always been placed in the second or on lower lines of the

ballot." The complaint characterized this practice as "arbitrary, preferential, discriminatory treatment" in violation of the equal protection clause of the Constitution and requested for relief, *inter alia*, a preliminary injunction enjoining the defendants from deciding the placement of candidates on the ballot in the November 1976 election by unconstitutional means.

A hearing was held on September 16, 1976 which the Docket describes as a "hearing held on motion for preliminary injunction."[1] Subsequent to the hearing the District Court entered on the Docket for September 20, 1976 "[p]reliminary injunction granted for plaintiff with opinion to follow." In that opinion, the district court accepted the expert testimony of Dr. Samuel A. Kirkpatrick, professor of political science at Oklahoma University, to the effect that there was a favorable effect created by first or top ballot placement. The court also found that plaintiff had been intentionally denied equal access to the top ballot position. Based on those two findings, the district court held that the Board's practice did violate the Constitution.

The district court's remedy required the Board of Election Commissioners to employ an impartial, public drawing to decide ballot placement for each party. In addition, the court ordered the defendants to devise a rotational ballot placement procedure for future elections.

A public lottery was used by the DuPage County Board of Election Commissioners for placing candidates on the ballot in the November 1976 general election. The Board now appeals from the rest of the district court's order.

B

Plaintiffs in *Sangmeister* were all candidates for office in Will and Cook Counties in the November 1976 general election. They all alleged that the practice of the

[1] When the Court Clerk announced the case at the hearing, he described it as a "motion for preliminary injunction." (Tr. at 3.)

Clerk in Will County and the Board in Cook County of placing the party of the Clerk in the first position on the ballot in general elections was unconstitutional and sought preliminary and permanent injunctions against the practice.

A hearing for a preliminary injunction was held on October 15, 1976 and the injunction was denied on the basis that there was too little time between the hearing date and the general election to award any relief.

On December 20, 1976, a trial was held before the district court. At that trial there were four witnesses: one expert for each side and the County Clerks of Will and Cook County. The plaintiffs' expert, Dr. Samuel A. Kirkpatrick[2] testified based on previous empirical studies done by other scholars[3] and his own research based on the Will County May 1976 primary election, "that on the average first place garners 3.3 percent more votes than second place." (Tr. at 110.) Dr. Kirkpatrick did recognize that there is a difference in ballot effect between primary and general elections and that he "would expect it to be somewhat reduced, perhaps by a percentage point, sometimes, maybe, as much as two percentage points." (Tr. at 118.)

The defendants' expert, Richard G. Smolka, a professor of government at American University, testified, based on his review of all previous studies on

[2] This is the same Dr. Kirkpatrick who testified at the *Culliton* hearing for a preliminary injunction.

[3] *See* Kamin, *Ethnic and Party Affiliations of Candidates as Determinants of Voting*, 12 CANADIAN J. PSYCH. 205 (1969); Coombs, Peters & Strom, *Bandwagon, Ballot Position and Party Effects: An Experiment in Voting Choice*, 3 EXPERIMENTAL STUD. POL. 31 (1974); Taebel, *The Effect of Ballot Position on Electoral Success*, 19 AM. J. POL. SCI. 519 (1975); Brooks, *Voters' Vagaries: The Value of Position on a Ballot*, 10 NAT'L. MUNICIPAL REV. 161 (1921); White, *Voters Plump for First on List*, 39 NAT'L. MUNICIPAL REV. 110 (1950); H. BAIN & D. HECOCK, BALLOT POSITION AND VOTER'S CHOICE (1957); Mueller, *Voting on the Propositions: Ballot Patterns and Historical Trends in California*, 68 AM. POL. SCI. REV. 1197 (1969); W. DURLEY, SECRETARY OF STATE'S UNPUBLISHED STATISTICAL TABLE OF 1970 AND 1974 PRIMARY ELECTIONS (1975); Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 SO. CAL. L. REV. 365 (1972).

the effect of ballot placement on voting that "there is virtually nothing at all been done on the subject much less anything been shown," and thus "there is absolutely no evidence upon which to base an opinion." (Tr. at 241.) He also testified that a rotational system for ballot placement would be a bigger administrative burden than it was worth given the lack of proven ballot placement effect on voting. (Tr. at 268.)[4]

Both of the County Clerks, Clara Hartley Woodard of Will County and Stanley T. Kusper, Jr. of Cook County were called by plaintiffs as adverse witnesses. Both witnesses testified that they had always placed their party at the top of the ballot for county offices in accordance with the customary procedure of the County Clerks in Illinois. (Tr. at 13-14, 26-28.) They both felt that such a practice was permissible under ILL. REV. STAT., 1975, ch. 46, § 16-3 which states:

> The list of candidates of the several parties and any such list of independent candidates shall be placed in separate columns on the ballot in such order as the authorities charged with the printing of the ballots [County Clerks] shall decide . . . .

At the end of the hearing, the district court orally rendered its decision in favor of the plaintiffs. The court held that "the position on the ballot for that candidate would be a preferred position on a general election even though he might appear under a party name." (Tr. at 415.) In addition, the court found that the record "shows a discrimination against the candidates who are deprived of the top position on the ballot." (Tr. at 415.)

To remedy the constitutional violation, the court required a

> rotation of the major parties' position on the general election ballot by precincts, even precincts with one

[4] This was a conclusion that had been drawn earlier by a federal task force on which Professor Smolka had worked. *See* OFFICE OF FEDERAL ELECTIONS, STUDY OF ELECTION DIFFICULTIES IN REPRESENTATIVE AMERICAN JURISDICTIONS (1973).

> major party at the top and the odd precincts with the other major party at the top.

(Tr. at 420).[5]

The defendants have appealed both the court's finding of a constitutional violation and its remedy requiring the County Clerks to adopt a rotational system for deciding future ballot placement.

II

In the *Culliton* case there is some dispute regarding the exact nature of the district court's order. The hearing was set on a motion for a preliminary injunction and the Docket reads that a preliminary injunction hearing was held and that the court granted plaintiff's motion for a preliminary injunction. Nonetheless, the district court's memorandum opinion could be read as prescribing more permanent relief to plaintiff.[6] This court declines to so read the district court's opinion. It is our view that this case involves merely an appeal of the lower court's grant of a preliminary injunction as provided in 28 U.S.C. § 1292(a)(1) (1970). We affirm the preliminary injunction against defendants and remand

[5] The district court restricted its remedy to major parties based on its view that it would be "unpractical and unrealistic" to include minor parties in a rotational placement system (Tr. at 418). The court reasoned:

> We have to be practical in any attempt to balance the interests of various parties in litigation. When we are balancing them against the interest of the community at large and the practicality of an intelligible and meaningful election, I believe the minor parties must stand aside.

Id. One minor party—the Libertarian party—was represented at the trial, but did not appeal this portion of the district court's order.

[6] The defendant claims that the district court merged a hearing on a preliminary injunction into one for a permanent injunction without sufficient notice in violation of FED. R. CIV. P. 65(a)(2). *See Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972). As shown below, we disagree with the defendant's interpretation of the proceedings before the district court.

to the district court for further proceedings on a permanent injunction to be conducted in accordance with the views expressed in the remaining portions of this opinion.

In reviewing the district court's order for a preliminary injunction, this court is mindful that it has "very limited scope of review," *Gillespie & Co. v. Weyerhauser Co.*, 533 F.2d 51, 53 (2d Cir. 1976) (per curiam), and must merely "satisfy ourselves that the findings of the trial judge are not clearly erroneous, and that he has not abused the broad discretion which is his in determining whether to grant or withhold interlocutory relief." *Brandeis Mach. & Supply Corp. v. Barker-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (per curiam). In addition, since this relief is merely interlocutory and thus this case is yet to be heard in full on the merits, this court should "refrain from unnecessary comment on the evidence." *Id.*

Examining the record in this case, it seems clear that plaintiff has "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation . . . ." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *Brandeis Machinery, supra* at 505. Plaintiff has brought in testimony that tends to establish that ballot position does have an effect on voting. Also, the testimony of the defendant County Clerk could be interpreted to suggest a discriminatory practice exists. Thus, the evidence supports fully the district court's preliminary injunction. A full hearing on the merits should now be held in accordance with the views expressed in the remainder of this opinion.

III

It has become well established that the power of the state to regulate elections must be exercised consistent with the dictates of the equal protection clause of the Fourteenth Amendment. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Communist Party v. State Bd. of Elections*, 518 F.2d 517 (7th Cir. 1975); *Anderson v. Schneider*, 67 Ill.2d

165, 365 N.E.2d 900 (1977). In determining the constitutionality under the equal protection clause of ballot placement procedures, this court in *Bohus v. Board of Election Commissioners*, 447 F.2d 821 (7th Cir. 1971), adopted a two-part test. First, the plaintiff must "show that top placement on the ballot is an advantage in an election . . . ." *Id.* at 822. *See also Weisberg v. Powell*, 417 F.2d 388, 392 (7th Cir. 1969) (per curiam). Second, the plaintiff must "prove the existence of an intentional or purposeful discrimination by authorities in which one class is favored over another." 447 F.2d at 822. *See also Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

The effect of ballot placement on voting is a question of fact, and our review is limited to whether the district court's finding was clearly erroneous within the meaning of FED. R. CIV. P. 52(a). 447 F.2d at 823. In the *Sangmeister* case, we hold that the trial court's conclusion that "top placement on the ballot would be an advantage to the plaintiff" is supported by substantial evidence and therefore is not clearly erroneous.

There were several studies presented to the district court by Dr. Kirkpatrick on the effect of ballot placement that reached the conclusion that a candidate placed first on a ballot acquires a substantial vote getting advantage. Dr. Kirkpatrick classified them into three general types of studies: field studies,[7] laboratory studies[8] and ex post facto research. Of these studies the

[7] In these studies the researcher goes into an electoral district just prior to an actual election and asks prospective voters to vote on a fictitious set of candidates. The only study of this kind cited by Dr. Kirkpatrick was *Kamin*, *supra* note 3. While the author of the study concluded that ballot placement did make some difference to those voters studied, its probative value is slight because it is over 20 years old, dealt with a Canadian Parliamentary election and was not really conducted to determine ballot placement effect.

[8] There have been two laboratory or voting simulation studies on ballot placement effect. *See Coombs, et al., supra* note 3; *Taebel, supra* note 3. Both of these studies found that there was a ballot placement effect on voting. The simulated vote attributable to ballot placement in one study was 5 percent (*Coombs, et al.*) and in the other, 6.3 percent (*Taebel*).

most numerous and probative are ex post facto studies in which actual election results—in elections with rotated ballots—are examined. Dr. Kirkpatrick concluded that from all of the ex post facto studies a favorable first place position effect was found in between 75 and 100 percent of the elections studied. (Tr. at 130.) In Dr. Kirkpatrick's study of the Will County 1976 Primary, he found that there was a positive first position ballot effect in eight of ten races. (Tr. at 111.) Almost all of these studies in their final conclusions support the district court's finding.[9]

Defendants attempt to discount the effect of these studies by arguing that none of them deals with an Illinois general election. It is true that most of these studies deal with primary and multi-candidate elections, and thus there are differences between the elections studied and the Illinois general election. Nonetheless, merely because the studies are not perfectly suited to the facts does not dissipate completely their probative value.[10] Moreover, defendants recognize that some of the studies deal with general elections and in those the general rule is that there is a first place position effect

[9] *See, e.g., Mueller, supra* note 3, at 1208 ("the candidate who is listed first in low visibility races has a definite advantage"); Note, *supra* note 3, at 376 ("one can attribute at least a five percent increase in the first listed candidate's vote total to a positional bias."); H. BAIN & D. HECOCK, *supra* note 3, at 14 ("even in a general election, where the voters have the more clear-cut guidance provided by party labels in making their choice, there is a considerable advantage to be gained by appearing in certain positions.").

[10] Such a restrictive view would almost totally eliminate any judicial use of the social sciences. Also, the Supreme Court has never taken so limited a position on the evidentiary uses of social science studies. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court relied on several general social science studies in concluding that segregation was harmful to black children. *Id.* at 494 n.11. Those studies were cited and relied on notwithstanding the fact that Professor Kenneth Clark had conducted specific doll tests on the black children who were the plaintiffs in one of the consolidated cases and testified as to the results of those tests. *See* R. KLUGER, SIMPLE JUSTICE 315-345 (1976).

on vote getting.[11] Finally, there are no unimpeached empirical studies that prove that there is no ballot placement effect.[12] In fact, even defendants' expert witness, Professor Smolka, did not so testify. He merely concluded as a social scientist that there was insufficient evidence upon which to draw a conclusion. (Tr. at 241.) We therefore conclude that there was no error in the district court's finding that first position on a ballot is an advantage to a political candidate.[13]

---

[11] Two of the studies are from the Note in the Southern California Law Review in which there was a 5.3% and a 6.1% first ballot position effect. Bain & Hecock present data on two general elections—a congressional election in Ohio and an election in Colorado—where they found generally that there was a first place ballot effect. *See* the conclusion they drew from their data quoted in note 9 *supra*.

[12] There were two studies mentioned at the trial that seemed to reach the conclusion that there was no first position effect on voting. Bagley, *Does Candidate's Position on the Ballot Paper Influence Voter Choice; A Study of the 1959 and 1964 British General Elections*, 19 PARL. AFFAIRS 162 (1966); Byrne & Pueschel, *But Who Should I Vote for for County Coroner?*, 36 J. POL. 778 (1974).

In the Bagley study, there were two elections studied. In the initial data analysis, it was found that there was a ballot placement effect in one election but not in the other. According to Dr. Kirkpatrick, a subsequent data analysis, however, proved that there was a ballot position effect in both elections. (Tr. at 205-06). Thus, this study actually favors plaintiffs' position.

The Byrnes and Pueschel study also concluded that there was no ballot position effect on voting. Dr. Kirkpatrick testified, however, that there was a serious methodological flaw in their research design. (Tr. at 207-08). It was his view that the study was deceptive because the researchers had chosen to study an aggregation of elections and not to examine each race separately. It was Dr. Kirkpatrick's opinion that such an approach might well mask the existence of a first position effect in specific races. (Tr. at 208).

[13] We should note that this court is not the first to find such an effect. *See, e.g., Kautenburger v. Jackson*, 85 Ariz. 128, 333 P.2d 293 (1958); *Gould v. Grubb*, 122 Cal. Rptr. 377, 536 P.2d 1337 (1975); *Elliott v. Sec'y of State*, 295 Mich. 245, 294 N.W. 171 (1940); *Holtzman v. Power*, 62 Misc.2d 1020, 313 N.Y.S.2d 904 (1970); *State, ex rel. Roof v. Board of Commissioners*, 39 Ohio St.2d 130, 314 N.E.2d 172 (1974).

There is some dispute about what is required by the second portion of the *Bohus* test, *i.e.*, the need to show intentional discrimination. *Bohus* itself is not very helpful in determining the meaning of that test since the court did no more than state it.[14]

This court, however, did find an intentional discrimination in *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969) (per curiam). That case involved an equal protection challenge to the practice of Secretary of State Powell of selecting arbitrarily for the top ballot positions candidates he knew and felt would make good candidates for Constitutional Convention Delegates. Mr. Powell testified at the trial that he deliberately placed candidates on the ballot with the hope that those placed at the top of the list would be elected. *Id.* at 391 n.4. Defendants argue that the intent requirement will only be satisfied by the types of statements made by Mr. Powell in the *Weisberg* case. They claim that since there is no testimony in this record expressly stating that the Clerk's practice was designed to aid the Clerk's political party, there can be no equal protection violation.

We disagree. Whatever the contours of the intent requirement are in general in equal protection analysis *see Washington v. Davis*, 426 U.S. 229, 240-42 (1976), we believe that the facts in this case satisfy that requirement. We note initially that the practice at issue here has been carried out for at least 100 years in DuPage, 40 years in Will and 30 years in Cook County. We also note that it appears that every County Clerk in Illinois engages in the same practice, regardless of whether he or she is a member of the majority or minority party in that county.

Such systematic and widespread exclusionary practices by the State officials satisfy even the strictest intent requirement. For instance, in *Snowden v. Hughes*, 321 U.S. 1, 9 (1944), the Court in explaining the intent requirement cited as proof of intent to tax unequally "a

---

[14] The court in *Bohus* affirmed the district court's determination that there was no first place ballot effect as being not clearly erroneous. 447 F.2d at 823. Thus, the court never reached the intent issue.

systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others." Similarly, in *Washington v. Davis*, 426 U.S. 229, 242 (1976), the Court considered what proof would be necessary to prove exclusionary intent in jury selection cases. The Court reasoned that "the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality . . . ." The widespread and persistent practice of Illinois County Clerks to exclude opposition party members from top ballot positions is sufficient to satisfy the standards adopted by the Court in *Snowden* and *Davis*.

Defendants respond that this discrimination can be justified on the basis that it satisfies the administrative need to avoid confusion and to have a consistent practice so that voters will know in advance where the parties will be on the ballot. It is difficult to understand how this practice satisfies those requirements any more efficiently than would a neutral system of ballot placement. In light of this fact, we find that the County Clerks' practice does not further any substantial state interest.

We believe that the evidence clearly supports the district court's conclusion that the discrimination is intentional or purposeful. We, therefore, hold that the practice of Illinois County Clerks of excluding plaintiffs from top ballot positions was intentional and worked a substantial disadvantage to them in violation of the Fourteenth Amendment to the United States Constitution.

IV

Defendants contend that the district court abused its discretion in ordering the County Clerks to adopt a rotational system for determining ballot placement. We agree. It is our view that although the district court has broad powers to fashion an appropriate remedy in the public interest, *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944); *Brown v. Board of Education*, 349 U.S. 294, 300

(1955); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971), the remedy in the *Sangmeister* case is unnecessarily restrictive.

There are several factors which mitigate against imposing a specific rotational system for ballot placement on the County Clerks. First, we are reviewing the administrative implementation of a state statute that delegated broad authority to these clerks. Presumably, the legislature had in mind that each clerk would adopt a ballot placement procedure well suited to the specific needs of each county. Since a rigid requirement that all clerks adopt a particular procedure might well undermine the State legislature's intent, it would be a proper application of the principles of federalism to abjure such a remedy.

Second, there is no reason to believe that the County Clerks would fail to adopt constitutionally permissible means of ballot placement. As a general rule, courts of equity need not impose specific requirements absent some reason to believe that a less restrictive approach will fail to remedy the constitutional violation. Plaintiffs cite cases upholding busing to demonstrate how broad the remedial powers of a federal court are. Those cases, however, also demonstrate the need for evidence that state officials will continue to violate the constitution before specific remedies should be imposed. As the Court in *Swann* stated: "Judicial authority enters only when local authority defaults." 402 U.S. at 16.[15]

Third, the district court, itself, was less than confident in its remedy. The court stated after the trial in its decision:

> I would not even discourage a re-hearing particularly on the question of the actual mechanics or practicability as to how this decision can be best effectuated or implemented. We really haven't had very much testimony on that.

---

[15] In evaluating the likely response of the County Clerks to this decision, we can draw no inference from the fact that we now find they have been violating the Constitution because this court approved this very practice less than seven years ago in *Bohus*.

(Tr. at 421.) In light of the fact that the issue is complex—for example, concern must be given to such problems as computer programming, type of voting device, possible combinations of ballots for printing, size of voting units, etc.,—it is not clear how well a court could devise a ballot selection method even after an exhaustive hearing. This is an area where the County Clerks must be presumed to be expert, or at least to have expert assistance available on these various problems and so are best suited for developing a constitutionally valid and practicable ballot placement procedure.

We thus vacate the district court's order that a rotational selection procedure be implemented by the County Clerks and remand the case to the district court to order the defendants to devise a constitutionally permissible ballot placement procedure. In adopting a procedure, the County Clerks should abide by the following guidelines:

1) The procedure adopted must be neutral in character. This court will not accept a procedure that invariably awards the first position on the ballot to the County Clerk's party, the incumbent's party (*see Mann v. Powell*, 333 F. Supp. 1261, 1267 (N.D. Ill. 1969) (three judge court), or the "majority" party.

2) The procedure adopted should take account of all political parties involved, major and/or minor. While we need not decide whether the district court's order to exclude minor parties from the rotational selection procedure was valid, we recognize that there may be serious questions about its constitutional propriety.

3) The County Clerks should feel free to adopt any constitutional procedure and to experiment

from election to election if they feel such an approach is desirable.[16]

To summarize, we affirm the district court's preliminary injunction in *Culliton* and remand the case for further proceedings on the permanent injunction consistent with this opinion. We affirm the district court's finding in *Sangmeister* that there has been a constitutional violation. We vacate the district court's remedy in *Sangmeister* and remand the case to the district court to order the defendants to adopt a constitutionally permissible ballot placement procedure.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[16] We note that in one of the exhibits at the trial there is included a list of methods by which political parties are assigned ballot positions in both primary and general elections throughout the fifty states. (Def. Ex. 9). One can only be struck by the diversity of approaches that have been taken by the various states. The County Clerks are encouraged to consider all of them in their search for a ballot selection procedure that is most appropriate for their respective counties.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE E. SANGMEISTER, et al.,
Plaintiffs,
vs.
CLARA HARTLEY WOODARD, et al.,
Defendants.
No. 76 C 3635

JUDGMENT

This action came on for trial before the Court, Honorable Thomas R. McMillen, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged enter judgment in favor of plaintiffs.

Dated at Chicago, Illinois, this 17th day of February, 1977.

H. Stuart Cunningham
Clerk of the Court
/s/ Kathleen Branch
Deputy Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM WALSH,
Plaintiff,
vs.
THE BOARD OF ELECTION COMMISSIONERS, etc., et al.,
Defendants.
No. 76 C 3752

JUDGMENT

This action came on for trial before the Court, Honorable Thomas R. McMillen, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged enter judgment in favor of plaintiff.

Dated at Chicago, Illinois, this 17th day of February, 1977.

H. Stuart Cunningham
Clerk of the Court
/s/ Kathleen Branch
Deputy Clerk of Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE E. SANGMEISTER, et al.,

Plaintiffs,

vs.

CLARA HARTLEY WOODARD, County Clerk of Will County, Illinois and STATE BOARD OF ELECTIONS,

Defendants.

No. 76 C 3635

WILLIAM WALSH, et al.,

Plaintiffs,

vs.

THE BOARD OF ELECTION COMMISSIONERS OF CHICAGO, et al.,

Defendants.

No. 76 C 3752

EXCERPT OF PROCEEDINGS

Before the Honorable Thomas R. McMillen on Thursday, February 17, 1977, at the hour of 2:00 o'clock p.m.

The trial resumed pursuant to adjournment.

Appearances:

Mr. James T. Ryan
Mr. J. Tobias Dixon
Mr. Joseph M. Cernugel
Mr. Richard A. Devine
Mr. Michael Levinson
Mr. John C. Reis
Mr. Joseph Nunes
Mr. John H. Bickley
Mr. Andrew M. Raucci

• • •

(Excerpt of Proceedings)

The Court: I have decided this matter on the basis of the evidence that I have heard in favor of the plaintiffs, in substance.

First of all, as far as the question of intentional or invidious discrimination is concerned, it appears to me that although there is no testimony that anyone intended to discriminate, the testimony that all of the county clerks place their own party at the top of the ballot raises a reasonable inference in my mind that they have the intention of favoring that particular party and the candidates in that particular party.

The second point that the plaintiffs admittedly have to prove is that the position on the ballot is a favored one if they are in the first position. Dr. Kirkpatrick's testimony, it seems to me, has established that by the weight of the evidence. I realize that some of his examples are not valid. Some of them are somewhat questionable. But he is, I think, qualified as an expert on the subject. He drew from certain studies which, in my opinion, establish that thesis by the weight of the evidence.

I am particularly impressed by the examples where candidates were rotated on either a precinct or other basis and received different percentages of the votes depending on their position on the ballot.

Now, admittedly there can be other factors involved. But when he and some of the authorities he relied on generalize from an entire state or subdivision bigger than a legislative district, for example, it seems to me that the possible variations equalize themselves and that it is a valid test of the effect of the ballot position.

(Excerpt of Proceedings)

I, frankly, do not see any great difference in the position in a general election than in a primary election. It is very difficult to find examples, or even to analyze examples from general elections because of the difference in facts that you have. But if a position of first place in a primary election is a favorable position for a candidate, even though the party is not involved because it is only within the party, it follows in my mind that the position on the ballot for that candidate would be a preferred position on a general election even though he might appear under a party name.

It is not particularly the fact that the party is favored—but I do think that happens also because of ballot position—but it is the candidate who is favored. So, I think that not only does ballot position establish a preferential position but it also shows discrimination against the candidates who are deprived of the top position on the ballot.

Now, there are no documents in evidence where the machine is set up with the party positions on the top running from left to right and the candidates' position on the left running from top to bottom. But I do not think that is a problem as far as my decision is concerned because you still have a top-to-bottom bias whether it is the candidate that is running from top to bottom as it was, at least on the machines in the suburban areas before they applied the vote-a-matic system, or as it now is in the city machines according to defendants' Exhibit 11.

Now, I do not think that the difference between the top and the second position needs to be shown to be more than a relatively small fraction of the vote. In other words, whether Dr. Kirkpatrick's figure is 4.4 per cent, 3.3 per

(Excerpt of Proceedings)

cent, or even somewhat less than 1 per cent, if it is a consistent bias—and I think it is—then it seems to me it constitutes a discrimination against some candidates.

Of course, one cannot tell which candidates are going to be affected by that in advance but by hindsight we know that many elections are decided by less than 1 per cent of the general vote. As a matter of fact, in Defendants' Exhibit 4, which is the Will County general election, the difference between the straight Republican and straight Democratic vote on November 2nd, 1976, seems to be somewhat in the vicinity of 1,000 votes out of 23,000 that were cast. So, that is less than 5 per cent if my mathematics is correct. But I am not relying on that particular statistic because I agree with Dr. Smolka that you cannot really be sure what a straight ballot is.

A person can vote a straight ballot even on a machine or on a vote-a-matic without punching that particular lever or that particular hole. If you go to vote for comptroller on page 2 of Defendants' Exhibit 4, the difference between the two candidates is much less than 1 per cent for the two major parties. If you go to vote for trustee of the University of Illinois you find the same relatively close race.

We all know from our common experience that the vote in Ohio, for example, in the last general election was decided by less than 1 per cent on the presidential level. I happen to live in a congressional district where the vote is being contested, but it is less than 1 per cent between the two candidates. I really should not go outside the record except I think everybody probably is familiar with those cases.

(Excerpt of Proceedings)

Another one I can remember is the Nixon-Kennedy vote in Illinois which was decided by less than 1 per cent in favor of President Kennedy.

In any event, many elections are that close. If the difference can be 3 or 4 per cent, as I think it apparently can from the evidence, that to me is an invidious discrimination against the candidate who doesn't get the first place.

Dr. Smolka, on the other hand, did not in my analysis of his testimony really do very much more than try to undermine the opinion of Dr. Kirkpatrick. So, although I anticipated we would have conflicting opinions from experts, I don't think that Dr. Smolka actually rendered an opinion that was contrary to Dr. Kirkpatrick's. He did criticize it. He showed some weaknesses in it. But the fact remains that a substantial part of Dr. Kirkpatrick's testimony remains unimpeached in my judgment, and the defendants have failed to contradict it with any expert opinion that might cause the balance to go the other way. So that the weight of the evidence in my judgment on the question of the bias for the first position is in favor of the plaintiffs in both cases.

Now, there is a serious problem of what should be done. With all due respect to the minority parties, I think that the problem of attempting to bring them within the scope of any kind of rotation is almost impractical and unrealistic. If they showed that the results of their position being less than first place caused a candidate to lose, or even caused him to fail to get 5 per cent of the vote I would have more sympathy with their position.

We have to be practical in any attempt to balance the interests of various parties in litigation. When we are

(Excerpt of Proceedings)

balancing them against the interest of the community at large and the practicality of an intelligible and meaningful election, I believe that the minority parties must stand aside.

Then we reach the question as to whether there is any practical way of rotating the political parties. I have reduced that now in my own mind and in what I have said to the two major political parties.

As I understand Mr. Kusper's testimony, the principal difficulty with rotation is the vast number of alternative types of ballots that would result if you attempted to rotate all of the parties and particularly within the parties all of the positions.

For instance, on Defendants' Exhibit 11 there are three candidates for trustee for the University of Illinois, three for representatives in the General Assembly, three for commissioners of Metropolitan Sanitary District, and I think some other multiple offices. I am not sure whether the judicial candidates were running head-to-head, but I believe they were. It doesn't say anything except "Vote for one". I think the way the machine was set up you had to vote head-to-head on all of the judicial candidates even though there were a number of them.

And, of course, on the retention ballot you voted for each one individually.

I do not think it would be practical, again, certainly in Cook County and probably in Will County, and I would assume in most counties that have voting machines or vot-a-matic types of elections to rotate the candidates within the parties. The candidates really are not complaining

(Excerpt of Proceedings)

about that in this case. I think that by rotating the parties the candidates perhaps are receiving sufficient benefit from that so that they are not unduly prejudiced.

For example, in the legislative race one candidate can receive three votes. There might be some--there probably is some distortion by the candidate being first among the three of his party, but I frankly don't think that that is serious enough to merit printing the very large number of ballots that would be required or the very large number of sample ballots that would be required and the excessive number of either voting machine settings or vote-a-matic punchcards that Mr. Kusper was talking about.

I do not understand his testimony to say that it would be impracticable or even unduly expensive if simply the major parties were rotated. My recollection of his answer when I asked him that question was that it could be done, that it might be difficult but not impossible.

I think in dealing with constitutional rights we have to reach a balance of the various factors and various considerations such as in the Brown vs. Board of Education case. Bussing is not a completely theoretically perfect solution and hasn't even been attempted in many jurisdictions, but it is an accommodation that improves the situation and comes as close as perhaps as practical in complying with the constitution. That is why in my opinion the solution in this case would be simply to require rotation of the major parties' position on the general election ballot by precincts, even precincts with one major party at the top and the odd precincts with the other major party at the top.

(Excerpt of Proceedings)

I think from what the attorney for Will County has said that probably that could be done without even additional expense other than changing the numbers on the cards. I do not think that the computers that count the cards in Cook County and the suburban areas would have to be duplicated. They could probably be set so that they could tabulate them the same way.

In any event, as I understand Mr. Kusper's answer, the same computers could be used that have been used in the past but possibly they would have to be programmed differently depending on which precinct they are going to count for. That wasn't a problem that was met in Will County because they consolidated all their counting in one area. But Mr. Kusper was not a computer expert and could not give us the complete answers.

Now, as you know, I wanted to decide this case promptly so that the parties could take whatever action they saw fit. This oral decision that I have rendered is oral because partly we do not have any proposed findings or conclusions submitted as I had hoped we would by today. I will only be here through tomorrow until March 7th. I would not discourage the parties from submitting formal findings of facts and conclusions of law. I would not even discourage a re-hearing particularly on the question of the actual mechanics or practicability as to how this decision can be best effectuated or implemented. We really haven't had very much testimony on that.

Mr. Kusper, as I said, did not purport to be fully familiar with the intricacies of the computer system that has just been introduced last year in his organization. My questioning of the attorney for Will County probably is not adequate to solve the problem.

(Excerpt of Proceedings)

If the parties are satisfied with the way the record is now I think we have a final order, a final decision and one which is appealable in my opinion. If motions to stay the finality of that, subject to consideration of actual written findings and conclusions, is made, I do not think the delay would be fatal to either side. I will be back on March 7th.

I am also willing to hear what further evidence or arguments the parties may want to make on the ruling that I just made on implementation of this decision. I am not at all sure that we have thought of all the problems. There may be some problems, pretty serious ones, that the parties want to bring up.

Did you want to say something, Mr. Bickley?

Mr. Bickley: I would like to ask the Court a question if I may, sir.

I am not familiar with the particular rule, but in the event the parties should decide that this is a final order and, as your Honor said, the appeal should not be delayed, could an appeal be filed within the 30 days or beyond court term time—or within court term time—I'm sorry—so that it might be consolidated with another appeal that is pending before the United States Court of Appeals?

The Court: I think under Rule 52, I believe it is, you have a final appealable judgment now. The only thing that is lacking is a piece of paper that the clerk fills out for me to sign that judgment was entered in favor of the plaintiffs.

The time for reconsideration of the decision that I have just made, I think, however, would run within 10 days. I won't be here during that 10-day period other than tomor-

(Excerpt of Proceedings)

row, but another judge will be handling my motion call for purposes of receiving motions.

So, you will have to make up your own minds about what you want to do and what the rules provide. I am afraid that I have done about all I can do this week, and until March 7th.

Mr. Bickley: Thank you, your Honor.

The Court: It has been well presented, gentlemen, and an interesting case.

Mr. Cernugel: Thank you, your Honor.

Mr. Ryan: Thank you, your Honor.

APPENDIX E

Chap. 46, Ill. Rev. Stat. (1975), Sec. 1A-8

1A—8. Powers and duties. § 1A-8. The State Board of Elections shall exercise the following powers and perform the following duties in addition to any powers or duties otherwise provided for by law:

(1) Assume all duties and responsibilities of the State Electoral Board and the Secretary of State as heretofore provided in this Act;

(2) Disseminate information to and consult with election authorities concerning the conduct of elections and registration in accordance with the laws of this State and the laws of the United States;

(3) Furnish to each election authority prior to each primary and general election and any other election it deems necessary, a manual of uniform instructions consistent with the provisions of this Act which shall be used by election authorities in the preparation of the official manual of instruction to be used by the judges of election in any such election. In preparing such manual, the State Board shall consult with representatives of the election authorities throughout the State. The State Board may provide separate portions of the uniform instructions applicable to different election jurisdictions which administer elections under different options provided by law. The State Board may by regulation require particular portions of the uniform instructions to be included in any official manual of instructions published by election authorities. Any manual of instructions published by any election authority shall be identical with the manual of uniform instructions issued by the Board, but may be adapted by the election authority to accommodate special or unusual local election problems, provided that all manuals published by election authorities must be consistent with the provisions of this Act in all respects and must receive the approval of the State Board of Elections prior to publication; provided further that if the

State Board does not approve or disapprove of a proposed manual within 60 days of its submission, the manual shall be deemed approved.

(4) Prescribe and require the use of such uniform forms, notices, and other supplies not inconsistent with the provisions of this Act as it shall deem advisable which shall be used by election authorities in the conduct of elections and registrations;

(5) Prepare and certify the form of ballot for any proposed amendment to the Constitution of the State of Illinois, or any referendum to be submitted to the electors throughout the State or, when required to do so by law, to the voters of any area or unit of local government of the State;

(6) Require such statistical reports regarding the conduct of elections and registration from election authorities as may be deemed necessary;

(7) Review and inspect procedures and records relating to conduct of elections and registration as may be deemed necessary, and to report violations of election laws to the appropriate State's Attorney;

(8) Recommend to the General Assembly legislation to improve the administration of elections and registration, and to consult with the Election Laws Commission in regard thereto;

(9) Adopt, amend or rescind rules and regulations in the performance of its duties provided that all such rules and regulations must be consistent with the provisions of this Article 1A or issued pursuant to authority otherwise provided by law;

(10) Determine the validity and sufficiency of petitions filed under Article XIV, Section 3, of the Constitution of the State of Illinois of 1970; and

(11) Supervise the administration of the registration and election laws throughout the State.

(12) The Board may by regulation delegate any of its duties or functions under this Article, except that final determinations and orders under this Article shall be issued only by the Board.

Added by P.A. 78—918, § 1, eff. Oct. 22, 1973.

APPENDIX F

Chap. 45, Ill. Rev. Stat. (1975), Sec. 16-3

16—3. Ballots—Manner of printing—Form—Contents, etc.] § 16-3. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot, except as is provided in Sections 16—6.1 and 21—1.01 of this Act; all nominations of any political party being placed under the party appellation or title of such party as designated in the certificates of nomination or petitions. The names of all independent candidates shall be printed upon the ballot in a column or columns under the heading "independent" arranged under the names or titles of the respective offices for while such independent candidates shall have been nominated and so far as practicable, the name or names of any independent candidate or candidates for any office shall be printed upon the ballot opposite the name or names of any candidate or candidates for the same office contained in any party column or columns upon said ballot. The ballot shall contain no other names, except that in cases of electors for President and Vice-President of the United States, the names of the candidates for President and Vice-President may be added to the party designation and words calculated to aid the voter in his choice of candidates may be added, such as "Vote for one," "Vote for three." In the case of an election for Representatives in the General Assembly, the words "Vote for one, two or three" shall be printed on the ballot immediately below the designation of the office. On the back or outside of the ballot, so as to appear when folded, shall be printed the words "Official Ballot," followed by the designation of the polling place for which the ballot is prepared, the date of the election and a facsimile of the signature of the clerk or other officer who has caused the ballots to be printed. The ballots shall be of plain white paper, through which the printing or writing cannot be read. The party appellation or title, or the word "independent" at the head of any column provided for independent candidates, shall be printed in capital letters not less than one-fourth of an inch in height and a circle one-half inch in diameter shall be printed at the beginning of the line in which such appellation or title is printed, provided, however, that no such circle shall be printed at the head of any column or columns provided for such independent candidates. The names of candidates shall be printed in capital letters not less than one-eighth nor more than one-fourth of an inch in height, and at the beginning of each line in which a name of a candidate is printed a square shall be printed, the sides of which shall be not less than one-fourth of an inch in length. However, the names of the candidates for Governor and Lieutenant Governor on the same ticket shall be printed in front of the bracket. [The list of candidates of the several parties and any such list of independent candidates shall be placed in separate columns on the ballot in such order as the authorities charged with the printing of the ballots shall decide;] provided, that the names of the candidates of the several political parties, certified by the electoral board to be several county clerks shall be printed by the county clerk of the proper county on the official ballot in the order certified by the electoral board. Any county clerk refusing, neglecting or failing to print on the official ballot the names of candidates of the several political parties in the order certified by the electoral board, and any county clerk who prints or causes to be printed upon the official ballot the name of a candidate, for an office to be filled by the Electors of the entire State, whose name has not been duly certified to him upon a certificate signed by the electoral board shall be guilty of a Class C misdemeanor.

When an electronic voting system is used which utilizes a ballot card, on the back of each ballot card, each ballot card envelope, and the last page of the ballot label when a ballot label is used, shall be printed the words "Official Ballot," followed by the number of the precinct and, as applicable, the number and name of the township, ward or

other election district for which the ballot card, ballot card envelope, and ballot label are prepared, the date of the election and a facsimile of the signature of the clerk or other officer who has caused the ballots to be printed.

In the designation of the name of a candidate on the ballot, the candidate's given name or names, initial or initials, a nickname by which the candidate is commonly known, or a combination thereof, may be used in addition to the candidate's surname. No other designation such as a title or degree or similar information may be used in connection with the candidate's surname, except that the title "Mrs." may be used in the case of a married woman.

Where voting machines or electronic voting systems are used, the provisions of this Section may be modified as required or authorized by Article 24 or Article 24A,[2] whichever is applicable.

Amended by P.A. 77—1762, § 1, eff. Dec. 8, 1971; P.A. 77—2414, §, eff. Jan. 1, 1973; P.A. 78—255, § 61, eff. Oct. 1, 1973.

16—4. § 16-4. Repealed by act approved May 19, 1965. L.1965, p. 599.

APPENDIX G

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that the Illinois State Board of Elections, Intervenor-Defendant Appellant above named, hereby appeals to the Supreme Court of the United States from the final Order of the United States Court of Appeals for the Seventh Circuit entered in this action on November 7, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1254(2).

Dated January 31, 1978.

/s/ Michael L. Levinson
/s/ Michael E. Lavelle
/s/ Franklin J. Lunding, Jr.
Attorneys for Illinois State Board of Elections

(Affidavit of Service.)

Supreme Court, U. S.
FILED
MAR 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-1100

In the

Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE E. SANGMEISTER, et al.,

Plaintiff-Appellees,

vs.

CLARA HARTLEY WOODARD, County Clerk of Will County, Illinois,

Defendant,

THE STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS,

Intervening Defendant-Appellant.

— Consolidated With —

WILLIAM WALSH,

Plaintiff-Appellee,

vs.

THE BOARD OF ELECTION COMMISSIONERS OF CHICAGO, et al.,

Defendants,

ILLINOIS ASSOCIATION OF COUNTY CLERKS AND RECORDERS,

Intervening Defendant.

On Appeal from the United States Court of Appeal for the Seventh Circuit

MOTION TO DISMISS OR AFFIRM

JAMES T. RYAN
GREENBERGER, KRAUSS & JACOBS, CHARTERED
180 North LaSalle Street, Suite 2700
Chicago, Illinois 60601
(312) 346-1300
Attorneys for Appellee, William Walsh.

The Schaffer Press, Inc.—(312) 263-6360

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1100

GEORGE E. SANGMEISTER, et al.,

Plaintiff-Appellees,

vs.

CLARA HARTLEY WOODARD, County Clerk of Will County, Illinois,

Defendant,

THE STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS,

Intervening Defendant-Appellant.

— Consolidated With —

WILLIAM WALSH,

Plaintiff-Appellee,

vs.

THE BOARD OF ELECTION COMMISSIONERS OF CHICAGO, et al.,

Defendants,

ILLINOIS ASSOCIATION OF COUNTY CLERKS AND RECORDERS,

Intervening Defendant.

On Appeal from the United States Court
of Appeal for the Seventh Circuit

MOTION TO DISMISS OR AFFIRM

Appellee William Walsh moves this Court, pursuant to Rule 16(1)(a) of the Rules of the Supreme Court, to dismiss the appeal herein for lack of jurisdiction because not taken in conformity with statute or, in the alternative, to affirm the judgment sought to be reviewed on the ground that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I. THE APPEAL WAS NOT TAKEN IN CONFORMITY WITH STATUTE.

Appellant State Board of Elections for the State of Illinois has appealed the decision of the United States Court of Appeals for the Seventh Circuit. That decision affirmed in part, and reversed and remanded in part the decision of the United States District Court for the Northern District of Illinois. In the District Court case, Appellee William Walsh, and other plaintiffs, argued that the defendant State officials, who had been given the authority to decide the position of candidates on electoral ballots, and who had consistently used their power to grant top position on the ballots to members of their own political parties, had by their systematic, discriminatory official conduct violated the plaintiffs' Fourteenth Amendment right to Equal Protection of the Laws. The district court, sitting without a jury, found in favor of the plaintiffs, and ordered a precinct-by-precinct rotation of the ballot positions of Democratic and Republican candidates. Jurisdictional Statement at 18a-27a

On appeal, the United States Court of Appeals affirmed the district court's finding on the unconstitutionality of the defendants' conduct, but vacated the district court's

order for precinct-by-precinct rotation. Jurisdictional Statement at 15a. The case was remanded to the district court with directions to enter an order that the defendants devise a constitutional method of ballot placement which would be neutral in character. Jurisdictional Statement at 14a-15a. The County Clerks were not to be prohibited or discouraged from experimenting with different procedures from election to election. Jurisdictional Statement at 14a-15a.

Appellant State Board of Election Commissioners contends that the basis of the Court's jurisdiction to hear the appeal from the decision of the Seventh Circuit is furnished by 28 U.S.C. §1254(2), which provides for Supreme Court review:

> "By appeal by a party relying on a State statute held by a [United States] court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, . . ."

This statute does not confer jurisdiction on this Court to hear this appeal, because no State statute was held by the Seventh Circuit, in the case below, to be repugnant to the Constitution, treaties or laws of the United States. The Seventh Circuit specifically held that it was the practice of the defendants which was unconstitutional. Jurisdictional Statement at 12a. This unconstitutional practice was not required by any State statute.

The only mention to a State statute in the opinion of the Seventh Circuit below is the Court's reference to the testimony of two county clerks that their practice was permissible under Ill. Rev. Stat., Ch. 46, §16-3, which gives to the authorities charged with the printing of ballots the additional authority to determine ballot place-

ments. Jurisdictional Statement at 5a. This is also the only State statute mentioned in Appellant's Jurisdictional Statement. Jurisdictional Statement at 3. Appellant never explains how the validity of this statute was attacked. Instead, Appellant talks broadly of "Illinois law and practice" (Jurisdictional Statement at 6), "Illinois election practices" (Jurisdictional Statement at 6), and "state administrative action" (Jurisdictional Statement at 8). Appellant at one point argues that, ". . . Illinois should be allowed to conduct its elections in accordance with the procedures set forth by the Illinois General Assembly." Jurisdictional Statement at 8. However, the only procedure set up by the General Assembly was the delegation to certain officials, by statute, of the authority to determine ballot placement. The decision of the Seventh Circuit did not change this statutory delegation of authority in any way. The only effect of the decision appealed from herein was to require State officials to act in a Constitutional manner. Since no state statute was held unconstitutional by the Seventh Circuit, in the decision appealed from herein, the Supreme Court does not have jurisdiction to hear an appeal of this case under 28 U.S.C. §1254(2).

II. THE QUESTIONS ON WHICH THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

In the event that this Court decides that it has jurisdiction to hear this case under 28 U.S.C. §1254(2), Appellee moves, pursuant to Supreme Court Rule 16 (1)(c), that the judgment of the Seventh Circuit in this case be affirmed on the ground that it manifests that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The appeal of this case is based solely on the contention that the Seventh Circuit erred below in upholding the district court's finding of fact that denial of top position in general elections harmed the party denied such a position. Jurisdictional Statement at 6-9. This court has consistently held that findings of fact concurred in by two courts below will not be reviewed in the absence of very obvious and exceptional error. *Grover Tank Manufacturing Company* v. *Linde Air Products Company*, 336 U.S. 271, 275 (1949) *and cases cited therein.* A fair reading of the opinion of the Seventh Circuit in the case below will reveal that its concurrence with the District Court's finding of fact on this issue did not and could not constitute very obvious and exceptional error. On the contrary, this finding found substantial support in the record. See Jurisdictional Statement at 8a-10a. Since this appeal is based solely on an allegedly erroneous finding of fact concurred in by the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit, and since there has been no very obvious or exceptional showing of error with respect to this finding, the Judgment of the Court of Appeals for the Seventh Circuit should be affirmed without further review of this Court.

Respectfully submitted,

JAMES T. RYAN
GREENBERGER, KRAUSS & JACOBS,
CHARTERED
180 North LaSalle Street, Suite 2700
Chicago, Illinois 60601
(312) 346-1300
Attorneys for Appellee,
William Walsh.